IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1123

W. D. DUNNING, JOHNNIE KYSER, AZALEA CITY BRANCH NO. 469, NATIONAL ASSOCIATION OF LETTER CARRIERS, a corporation or association, and NATIONAL ASSOCIATION OF LETTER CARRIERS, a corporation or association,
Petitioners,

v.

EARL BOYES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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Petitioners, W. D. Dunning, *et al.*, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in this case.

OPINION BELOW

The opinion of the Supreme Court of Alabama (App. B, *infra*, pp. 3a-9a) is not yet reported. No opinion was rendered by the Circuit Court for the Twelfth Judicial District, Alabama.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered September 30, 1977, p. 9a, *infra*. A timely petition for rehearing was denied on November 18, 1977. App. C, p. 10a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). See point 5, *infra*, pp. 20-21.

QUESTIONS PRESENTED

Whether federal labor law precludes a state libel action arising out of a grievance proceeding under a collective bargaining agreement with the United States Postal Service, in which a Postal supervisor is charged with discriminatorily denying a merit increase to an employee because of his race, and, in that context, is labeled a "known Bigot". This question comprehends three subsidiary issues:

1. Is a defamatory statement made in the course of, and relevant to, a federal grievance proceeding absolutely, or only qualifiedly, privileged under federal labor law?

2. Is the term "known Bigot," in the context stated, an expression of opinion protected against state libel law by federal labor law and policy?

3. May a state court proceed to trial on a libel complaint arising out of a labor dispute which fails to allege "malice" in the *New York Times** sense?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, paragraph 2, of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

* *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Article I, Section 8, provides in relevant part: "The Congress shall have power * * * To regulate Commerce * * * among the several States * * *;" and "To establish Post Offices and post Roads."

The pertinent provisions of the Postal Reorganization Act are as follows:

39 U.S.C. § 1209(A) [84 Stat. 737]:

> "Employee-management relations shall to the extent not inconsistent with provisions of this title, be subject to the provisions of sub-chapter II of chapter 7 of title 29 [the National Labor Relations Act]."

39 U.S.C. § 1201 (note to Sec. 10) [84 Stat. 785, § 10(b) of the Act]:

> "Any agreement negotiated under this section shall establish a new wage schedule whereunder postal employees will reach the maximum pay step for their respective labor grades after not more than 8 years of satisfactory service in such grades. The agreements shall provide that where an employee had sufficient satisfactory service in the pay step he occupied on the effective date of this section to have qualified for advancement to the next highest pay step under the new wage schedule, had such schedule been in effect throughout the period of such service, the employee shall be advanced to such next highest pay step in the new schedule on the effective data of the new schedule."

39 U.S.C. § 1206(a) and (b) [84 Stat. 735]:

> "(a) Collective-bargaining agreements between the Postal Service and bargaining representatives recognized under section 1203 of this title shall be effective for not less than 2 years.

"(b) Collective-bargaining agreements between the Postal Service and bargaining representatives recognized under section 1203 may include any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration, or the parties may adopt any such procedures by mutual agreement in the event of a dispute."

The pertinent provisions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 *et seq.*, are as follows:

"151. * * * It is declared to be the policy of the United States to * * * encourag[e] the practice and procedure of collective bargaining and protect[] the exercise * * * of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"152. When used in this subchapter * * * (9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment * * *."

The pertinent provisions of the Labor-Management Relations Act, 61 Stat. 201, 29 U.S.C. § 171 *et seq.*, are as follows:

"171. It is the policy of the United States that—(a) sound and stable industrial peace * * * can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees; * * *

"173(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method

for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement * * *."

STATEMENT

1. *The Facts.* Respondent Earl Boyes filed a common law libel action in the Circuit Court of Mobile County, Alabama, claiming damages of $50,000 from petitioners for "falsely and maliciously" characterizing him as a "known Bigot" in a letter sent to an official of the United States Postal Service ("the Service" or "USPS"). As appears on its face, the letter (*infra*, pp. 8a-9a), was a step in prosecution of an employee grievance under the collective bargaining contract between the Service and petitioner National Association of Letter Carriers (NALC).

Petitioner Azalea City Branch No. 469 ("Branch") is an autonomous local union affiliated with NALC. Under Executive Order 11491 and (subsequently) the Postal Reorganization Act and the National Labor Relations Act, the Service has at all relevant times recognized the NALC and its Branch 469 as the exclusive bargaining agent for city letter carriers in the area of Mobile, Alabama.

Throughout the period in question, wages, hours and working conditions of all city letter carriers nationally have been governed by an Agreement between the Service and NALC, pertinent provisions of which are set out in App. D, *infra*, at pp. 11a-17a, p. 6, n.1 and pp. 12-13, n.4. Article XV of that Agreement establishes a grievance-arbitration procedure and defines a "grievance" as any "dispute * * * or complaint" relating to "wages, hours, and conditions of employment," including any complaint involving the "interpretation, application of, or compliance with" the Agreement (pp. 11a-17a). The procedure consists of a series of "steps" to be followed in the resolution of such disputes, including Step 2A which provides for an

appeal in writing to "the installation head or his designee." At this step the grievant is represented by a "steward or a Union representative" (*ibid.*).

Pursuant to these provisions, a letter was sent to the Postmaster of the Mobile, Alabama, station on May 9, 1976, on the official stationery of petitioner Branch. The letter (which is appended to the opinion of the court below, App. B, *infra*, at pp. 8a-9a) identifies itself as "an appeal to Step 2A of a grievance decision" rendered by respondent, Assistant Superintendent (204-B)* Earl Boyes. It asserts in substance that the decision appealed from denied letter carrier Johnnie Kyser the "step" wage increase to which he was entitled under Article IX, Section 5, of the National Agreement between the Postal Service and petitioner NALC,[1] which effectuates the mandate of Section 10(b) of the Postal Reorganization Act, 84 Stat. 785 *supra*, p. 3. The letter continues:

> "[Kyser's] record does not indicate a serious unsatisfactory service in the performance of his duties. In fact! [sic] It displays a good job. However, it does smack of Racial Overtones. He is the only [one] denyed [sic] a step increase in the station. He is also Black. He had no trouble until Earl Boyes, a known Bigot, arrived at the Station."

The letter was signed by petitioner Kyser as the "Aggrieved" and petitioner Dunning as "Shop Steward". Boyes brought suit against both Kyser and Dunning and against petitioners Branch No. 469 and NALC.

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* In Postal Service parlance, the designation "(204(b))" indicates temporary as distinguished from permanent status.

[1] Article IX, Section 5, effective July 21, 1975 through July 20, 1978, tracks the two preceding National Agreements. It reads:

> "*Granting Step Increases.* The Employer will continue the program on granting step increases for the duration of this Agreement."

2. *Proceedings Below.* Defendants (petitioners here), moved to dismiss the complaint on federal preemption and conflict grounds, asserting (1) that the letter complained of was a step in the orderly and peaceful resolution of a labor dispute through the grievance procedure established by a federally mandated collective bargaining agreement and was therefore absolutely, rather than qualifiedly, privileged under the federal preemption doctrine;[2] (2) that the term "known Bigot," in context, may not be deemed a false statement of "fact," but must be considered a federally protected expression of "pejorative opinion" or "rhetorical hyperbole"; and (3) that the complaint is fatally defective for failing to plead "malice" in the *New York Times* v. *Sullivan* sense, citing, *inter alia*, *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966) and *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974). The trial court denied petitioners' motion (App. 3a, *infra*).

The Supreme Court of Alabama granted petitioners' petition to appeal from the denial (App. 1a, *infra*), which it characterized as holding "in effect * * * that Alabama should recognize only a *qualified* privilege to communications made in the course of a labor grievance proceeding, and that whether the reference to the plaintiff as a known Bigot was libellous was a question for a jury." (App. 3a, *infra*). The Alabama Supreme Court affirmed. *Ibid.*, 3a, 5a, 6a, 7a. It rejected the Tenth Circuit's interpretation of *Linn* in *General Motors Corp.* v. *Mendicki*, 367 F.2d 66, 71-72 (10 Cir. 1966), which holds that the "malice" exception from federal preemption is inapplicable to state-

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[2] The term "labor dispute" is defined by the National Labor Relations Act, § 2(9), 29 U.S.C. 152(9), to include "any controversy concerning terms * * * of employment." This definition is made applicable to the Postal Service by the Postal Reorganization Act, 39 U.S.C. § 1209(a), 84 Stat. 737. The federal preemption doctrine applicable to labor relations affecting commerce generally is applicable to labor relations in the Postal Service. *Letter Carriers* v. *Austin*, 418 U.S. 264, 273-278 (1974).

ments "made in the course of and relevant to a federal grievance proceeding" and adopted what "we consider is a better rule" for such proceedings, *i.e.*, qualified rather than absolute privilege (p. 5a, *infra*). It also rejected defendants' claim that the use of "robust language," such as "known Bigot," is "expressly fostered by Congress and approved by the NLRB" (*Austin, supra*, 418 U.S. at 272) (pp. 6a-7a, *infra*). Finally, the court sustained the adequacy of the complaint, holding that although malice in the *New York Times* sense was not pleaded

> "The plaintiff may be able to prove that the characterization of him was a deliberate or reckless untruth. The jury could infer that the characterization meant that Boyes discriminated against Kyser because of Kyser's race. If the charge were true, it could have meant that Boyes was guilty of violating Federal laws and regulations. See 42 U.S.C. 2000e-16 (1974), and Postal Service, 39 C.F.R. § 447.25 (1976)." (p. 7a, *infra*).

On November 18, 1977, defendants' motion for rehearing was overruled without opinion (*infra*, App. C, p. 10a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below is in Square Conflict With the Tenth Circuit's *Mendicki* Decision on the Issue of Absolute Privilege and on Interpretation of *Linn*.

A. On the question whether statements made in the course of and relevant to federal grievance proceedings are absolutely or only qualifiedly privileged, the decision below is admittedly in square conflict with *Mendicki*, p. 7, *supra*. In *Mendicki*, the Court of Appeals ordered dismissal of a slander suit based upon defamatory statements made by employer representatives at a grievance conference held pursuant to a collective labor agreement concerning the employee-plaintiff's claim of wrongful discharge. The court held that defamatory "statements made

> either by representatives of management or by representatives of an employee at a conference and bargaining session [for] the adjustment of a grievance of the employee * * * are unqualifiedly privileged" (367 F.2d at 70). The decision was grounded on "[the] declared policy of the national legislation on labor relations * * * to encourage, facilitate and effectuate the settlement of issues between employers and employees through the 'processes of conference and collective bargaining * * *' in order to promote and preserve industrial peace" (*id.*).[3] The court held that Congress intended that participants in such conferences "should feel free to express their respective contentions as to the pertinent facts and issues involved fully and frankly and to strongly support their positions with respect to the controversy * * * 'untrammelled by fear of retribution for strong utterances'" (*id.*, at 71).

The inadequacy of qualified privilege to protect full freedom of relevant utterance in judicial and quasi-judicial proceedings, including arbitration, is recognized in federal law. *Mock* v. *Chicago, Rock Island and Pacific Railroad Co.*, 454 F.2d 131, 133-135 (8 Cir., 1972); *Corbin* v. *Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393, 395-397, 398, n. 14 (D.S.C.), aff'd per curiam, 398 F.2d 543 (4 Cir., 1968). Qualified privilege is at least equally inadequate to achieve the Congressionally sponsored objective of grievance and collective bargaining proceedings—settlement of disputes—as the *Mendicki* court recognized. It is indisputable that the attraction and effectiveness of contract grievance procedure as a

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[3] This Court has repeatedly stressed the overriding importance in national labor policy of channelling labor disputes concerning interpretation or application of collective bargaining agreements into grievance proceedings culminating in arbitration. *Nolde Bros., Inc.* v. *Local 358 Bakery and Confectionery Workers Union*, 430 U.S. 243, 253 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 46, n. 6 (1974) and accompanying text.

safety valve and substitute for strikes and the chances of successful adjustment of labor disputes through such procedures would suffer if the parties were to any degree restrained from free and vigorous presentation of their respective contentions by fear of having to defend a state court defamation suit or suffering a judgment for damages therein. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 485-486 (1975).

For that reason it has been held that "[a]n absolute privilege * * * exists under federal law as to statements and communications made in compliance with requirements of a collective bargaining agreement mandated by the [federal] act." *Macy* v. *Trans World Airlines, Inc.*, 381 F.Supp. 142, 148 (D. Md. 1974), citing authorities. To qualify or restrict that privilege "would frustrate effective implementation of the [National] Act's processes." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969), quoted in *Machinists* v. *Wisconsin Emp. Rel Comm'n*, 427 U.S. 132, 147-148 (1976). State courts, as well as federal courts, have followed *Mendicki* in so holding. *Neece* v. *Kantu*, 84 N.M. 700, 507 P.2d 447, 452-454 (1973); *Rougeau* v. *Firestone Tire and Rubber Co.*, La. App., 274 So. 2d 454, 457, n. 1 (1973); *Corbin* v. *Washington Fire & Marine Ins. Co.*, *supra*; *Marsh* v. *Pacific Motor Trucking Co.*, 89 LRRM 2518, 2522 (D.C.C.D. Calif., 1975).

The court below did not articulately evaluate the impact of denial of absolute privilege upon the effective presentation of adversary positions in grievance proceedings. Instead, it followed an intermediate New York State court decision holding that the scope of privilege for utterances in federally mandated grievance proceedings is governed by state rather than federal law because:

> "there are no express provisions of Acts of Congress specifically governing defamation actions arising from statements made during the course of a labor grievance proceeding, nor prohibiting a State court from applying its own laws, where not inconsistent with national labor policies." *Bird* v. *Meadow Gold Products Corp.*, 1969. 60 Misc.2d 212, 302 NYS 2d 701.

The Alabama Supreme Court held that recognition of only a qualified privilege in the grievance context is not "inconsistent with national labor policy" because qualified privilege is the "general rule" established in *Linn* (p. 5a, *infra*), and because

> "'Malicious libel enjoys no constitutional protection in any context,' the Court said in *Linn*. 'After all, the labor movement has grown up and must assume ordinary responsibility,' the Court added." (p. 6a, *infra*).

B. In holding that the "malice" exception extends to statements in grievance proceedings, the Alabama court interpreted *Linn* exactly contrary to the Tenth Circuit's interpretation in *Mendicki*. The Tenth Circuit perceived that the "malice" exception was designed, *pro tanto*, to curb the use of deliberate falsehood as a weapon of conflict in the waging of labor disputes, but, unlike the Alabama court, also recognized that the *Linn* curb must stop short of formal proceedings mandated by federal collective bargaining contracts to adjust disputes—for extension would defeat the very object Congress sought to gain through encouraging such proceedings. The court below in this case, however, evidently interpreted the phrase "in any context," in *Linn* (p. 11, *supra*), to mean "in any forum" or "in any proceeding," an interpretation which would overturn the established application of the absolute privilege rule to defamatory utterances in federal judicial, quasi-judicial and arbitration proceedings, pp. 9-10, *supra*. Of course, there is not a scintilla in *Linn* to suggest that this Court had any such result in mind, or that the phrase "in any context" was more than a

reference to other kinds and subjects of dispute than labor issues.

C. The instant case is a singularly egregious illustration of the incompatibility of qualified privilege in the grievance procedure context with the objectives of national labor policy. The underlying dispute was whether the denial of a step increase to petitioner Kyser, assertedly for inadequate performance, was in fact justified. The offending letter was a formal presentation to the employer's designated representative, setting out the case for the aggrieved employee, submitted in step 2(a) of the contractual grievance procedure. The letter discussed Kyser's work record, denied that it warranted withholding of a step increase, and, by way of supporting the claim that racial animus rather than performance was the true reason for the denial, stated that Kyser was the only one in the Station who was refused a step increase, that Kyser was black, that he had had no trouble until Boyes arrived at the station and that Boyes was a "known Bigot" (p. 6, *supra*). This characterization of Boyes was clearly pertinent to the issue in dispute, and beyond doubt, the dispute was subject to the grievance procedure. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-60 (1974). Holding that characterization unprotected because it may be read as charging Boyes with "violating Federal laws and regulations," *supra*, not only chills freedom of expression in grievance proceedings generally, but specifically impairs the Congressionally protected right to charge racial discrimination in employment in contractual grievance proceedings[4] (*Alex-*

[4] Article II, Section 1, of the National Agreement provides:

"Section 1. The Employer and the Unions agree that there shall be no discrimination by the Employer or the Unions against employees because of race, color, creed, religion, national origin, sex, age, or marital status or because of a physical handicap with respect to a position the duties of which can be performed efficiently by an individual with such a physical handicap without danger to the health or safety of the physically handicapped person or to others."

ander case, *supra*; cf. *Nash* v. *Florida Industrial Comm'n.*, 389 U.S. 235), thereby flouting another Congressional policy of "highest priority". *Newman* v. *Piggy Park Enterprises*, 390 U.S. 400, 402 (1968).

In the courts below plaintiff-respondent argued that the characterization exceeded the bounds of qualified privilege under Alabama law because it was "gratuitous," not "reasonably necessary" to settlement of the grievance and not "just and fair". Brief of Appellee to the court below, pp. 3, 10-11. That ground is in square conflict with the federal case law under which absolute privilege is not confined to the minimally "necessary": it covers all statements which are "relevant" (*Mendicki* case, *supra*), or "pertinent" (*Corbin* case, *supra*), to presentation or defense of a grievance. Immunity extends to statements which are even "arguably relevant" (*Austin* case, *supra*, 418 U.S. at 279), for *Austin*, at 283, holds that courts are not authorized to substitute their judgment for that of a protagonist as to what "rhetoric is an effective means to make its point." The court below conceded (p. 3a, *infra*) that the allegedly defamatory characterization was relevant and pertinent to the grievance.

II. The Decision Below is in Conflict With the Holding of This Court in *Austin* v. *Letter Carriers* That Derogatory Expressions of Opinion and Rhetorical Epithets in Labor Disputes Are Not Subject to State Libel Actions.

The grievance proceeding context aside, the decision below is in conflict with this Court's holding in *Austin*, *supra*, at 284, that "[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact," in contrast to "[e]xpression of * * * an opinion,

even in the most pejorative terms." In that case, union newsletters had characterized plaintiffs as "scabs," defining "scab" in such terms as "a traitor to his God; his country, his family, and his class," with a "backbone of jelly and glue," and a "tumor of rotten principles" (*id.* at 268). These pejorative ascriptions were held immune to libel suits under the *New York Times* standard, because "words like 'traitor' cannot be construed as representations of fact" (*id.* at 284); they are rather expressions of opinion, "loose language and undefined slogans that are part of the conventional give-and-take in our economic and political controversies" (*id.*). To use such slogans, the Court said, "is not to falsify facts," citing *Cafeteria Employees Local 302* v. *Angelos*, 320 U.S. 293, 295 (1943), which dealt similarly with the terms "fascist" and "unfair" in union picketing.

In *Gregory* v. *McDonald Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Reptr. 641 (1976), the Supreme Court of California, on the authority of *Austin*, affirmed dismissal of a defamation action brought by union leaders who had been characterized in an employer bulletin as willing to sacrifice their members' interests for their own personal ambitions. These charges, the court said, are "of the kind typically generated in the 'economic give-and-take' of a spirited labor dispute, in which the judgment, loyalties, and subjective motives of rivals are reciprocally attacked * * *" (552 P.2d at 429).

The term "bigot" is a commonplace pejorative in the context of race discrimination controversy. "Bigot" is defined in Webster's New International Dictionary (Second Edition), p. 266, as "one obstinately and irrationally, often intolerantly, devoted to his own * * * belief, or opinion." Certainly the term carries no more opprobrium than "fascist," "traitor," "backbone of jelly," "rotten principles," or "blackmail,"—which this Court, in *Greenbelt Cooperative Publishing Association* v. *Bresler*, 398

U.S. 6, 14 (1970), characterized as "no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable."

In the instant case, the phrase "known Bigot" was clearly used as "an effective means to make" the writers' point that, in their opinion, Boyes was considered prejudiced against blacks, and that his denial of the step increase had been based on racial antipathy rather than Kyser's performance. It was a colorful assertion of the writers' opinion of Boyes' reputation, not a representation of fact. The identical conclusion was reached in an earlier case which, by strange coincidence, also involved a charge of prejudice made by a Letter Carrier Union official against a Postal supervisor in a letter to the local Postmaster. In that case, *Silbowitz* v. *Lepper*, 55 Misc.2d 456, 459 (S. Ct. N.Y., 1967), aff'd 32 A.D.2d 520, 299 N.Y.S.2d 564, 567 (1969), the court said:

> "The characterization by Lepper of the plaintiff's actions as 'vicious and discriminating' is nothing more than an expression of Lepper's opinion based upon his contentions as set forth in the letter. This expression of an opinion, although having a tendency to establish the existence of the ill will of Lepper toward plaintiff, does not furnish the basis for a finding of actual malice within the meaning of the *Times* v. *Sullivan* rule."

The court below explicitly rejected, albeit without explanation (p. 6a-7a, *infra*), petitioners' contention based, *inter alia*, on *Linn*, 383 U.S. at 58 and *Austin*, 418 U.S. at 286, that the "type of robust language and clash of strong personalities that may be commonplace in various labor contexts" (*Farmer* v. *Carpenters, Local 25*, 430 U.S. 290, 305-306 (1977)) is "protected by federal law," *Austin, supra*, at 283, and therefore "immune to state libel law." Although it quoted this Court's statement in

Farmer (*id.*, p. 6a) that "[t]he potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based upon such commonplace derogatory expressions," and conceded that "robust language is sometimes used in labor disputes" (*id.*, p. 7a), the Alabama court drew the opposite conclusion: "it is for a jury to say whether [the "robust language"] was an abuse of the qualified privilege under all the facts and circumstances of the case." The Supreme Court of Alabama thereby misinterpreted this Court's decisions.

III. The Court Below Erred in Sustaining a Complaint in Which Malice in the *New York Times* Sense is not Alleged.

The decision below misconceives the scope of immunity to state defamation jurisdiction established by *Linn*, *supra*. That decision held "that libel actions under state law [are] preempted by the federal labor laws to the extent that the State [seeks] to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth." *Austin*, *supra*, 418 U.S. at 273. To invoke state court jurisdiction under *Linn*, a complaint must *plead* that "the statements were made with malice [in the *New York Times* sense] and injured" the plaintiff.[5] *Linn*, *supra*, at 55. Because the complaint in *Linn* did not "make the specific allegations that we find necessary in such actions," this Court remanded with leave to Linn to amend his complaint "to meet these requirements." 383 U.S. at 66.

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[5] Of course, the complaint herein is additionally defective under *Linn*, inasmuch as it does not allege that the so-called libel injured plaintiff. Actual damages may not be deemed to be implicitly alleged, for the Alabama Code of Civil Procedure requires that "[w]here special damages are claimed, they shall be specifically stated [in the complaint]". 23 Code of Ala., Rule 9(g).

The pleading requirements are constitutionally jurisdictional. Under the preemption doctrine, state power does not extend to defamation in labor disputes which does not satisfy the *New York Times* "malice" standard. To sustain a complaint deficient in this respect is to impose on parties to labor disputes the burden and expense of litigation which, by virtue of the Supremacy Clause, a state is not constitutionally empowered to conduct. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). The threat of such litigation cannot fail to impede and chill the "freewheeling use of the written and spoken word * * * [which] has been expressly fostered by Congress and approved by the NLRB." *Austin*, *supra*, 418 U.S. at 272; *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 969 (D.C. Cir., 1966):

> "The threat of being put to the defense of a lawsuit brought by a popular public official [or an adversary in a labor dispute] may be as chilling * * * as fear of the outcome itself * * *."

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, this Court recognized that for a state to permit a trial to be held where, under federal standards, "there should be no trial at all" (*id.*, at 485), can "only further harm" freedom of expression. (*id.*, at 486). *Cf. Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). Accordingly, unless malice in the *New York Times* sense is adequately pleaded, the Supremacy Clause necessarily "forecloses further proceedings [on the complaint] in the state court." 420 U.S. at 486, n. 13. Foreclosure

> "* * * accords with the *Times* objective to minimize the inhibiting effect of the expense involved in defending libel suits on 'the vigor and . . . the variety of public debate.' *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279; *Time, Inc.* v. *Hill*, 385 U.S. 374, 389." *Roketenetz* v. *Woburn Daily Times, Inc.*, Mass. App., 294 N.E.2d 579, 584 (1973).

Of course, the *New York Times* standard cannot be satisfied by merely pleading the legal conclusion that the alleged falsehood was published "with knowledge of its falsity or in disregard of its truth." The pleader "must allege *facts* from which [the inference of knowing or heedless falsehood] reasonably could be inferred * * *." *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975) (emphasis added). As stated in *Roketenetz, supra*, (*id.*):

> "[T]he 'actual malice' required by the *Times* case is, as Prosser points out, akin to deceit and misrepresentation, rather than motive. Prosser, Torts (4th ed.) § 118, p. 821. It should, therefore, like fraud, be pleaded with particularity greater than the bare phrase. * * * The mere incantation of the words 'actual malice' should not be enough to put a defendant to the expense of a trial.[5]

[5] The Federal Courts have recognized this consideration and have held summary judgment (Rule 56, Fed.R.Civ.P.) appropriate to avoid a trial. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970), and cases cited. * * * '[A]ctual malice' in the *Times* sense is not merely 'a condition of mind,' but more nearly like fraud as to which the first sentence of Rule 9(b), Fed.R.Civ.P. applies ('in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity'). See *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 65-66."

The complaint in the instant case alleges neither knowledge of falsity nor disregard of truth; it alleges only that the statements were made "falsely and maliciously" and "with intent to defame plaintiff and injure him * * *".[6]

[6] The complaint read in its entirety as follows:

> "The plaintiff claims of the defendants Fifty Thousand and No/100 Dollars ($50,000.00) damages for falsely and maliciously publishing of and concerning him in a letter written in Mobile, Alabama, to Postmaster Edward Fuller, the following matter, with intent to defame plaintiff and injure him in his employment status, . . . :
>
> 'That defendant, Kyser '* * * had no trouble until Earl Boyes, a known Bigot, arrived at the station.' "

This is the standard form for charging common law libel based on words actionable *per se*.[7] That is "insufficient to make out a cause of action under the *Times* standard." *Roketenetz, supra*, 294 N.E. 2d, at 583-584 (1973).

Whether a complaint meets the *Linn* tests (and in particular whether the language complained of may be considered a fact subject to the test of truth or falsity) is a question of federal law for the court, not a question of fact or of state law which a state may leave to a jury. *Austin, supra*, 418 U.S. at 282; *Greenbelt Publishing Assn.* v. *Bressler*, 398 U.S. 6, 11; *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y.S. 2d 943, 951 (1977). *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Reptr. 641 (1976). Moreover, this Court has admonished that the availability under federal law of economic weapons to parties to labor disputes cannot "depend upon the forum in which [a party] presses its claims." *Machinists* v. *Wisconsin Employee Relations Commission*, 427 U.S. 132, 152. *A fortiori*, it cannot depend upon the standards of a particular state court or jury as to what language is unjustified or abusive (see, *id.*, n. 15).

IV. The Questions Presented Are Substantial and Important.

The intrinsic importance of the questions presented is self-evident. They involve major issues of interpretation and application of this Court's preemption decisions in the area of defamation in labor disputes, an area which has repeatedly drawn this Court's concern. The present issues affect the day to day conduct and potential subjection to court litigation of all parties to labor disputes

[7] In Alabama, if the language complained of is deemed to expose the plaintiff to "public ridicule or contempt," damage is presumed and the language is actionable without more. *Tonsmeire* v. *Tonsmeire*, 281 Ala. 102, 199 So.2d 645 (1967). See *Linn, supra*, 383 U.S. at 58, n.2 and accompanying text.

governed by federal law. The first subsidiary question affects the course of all grievance proceedings under contracts governed by federal law.[8] The decision below may reasonably be expected adversely and substantially to diminish the effectiveness of the system of adjustment Congress relied on to preserve industrial peace, not only in Alabama, but everywhere the decision below becomes known. The third subsidiary question has implications beyond *Linn*, for it affects application of the *New York Times* doctrine to all defamation complaints, not merely to those arising out of labor disputes.

V. The Decision Below is a Final Judgment Within the Meaning of 28 U.S.C. § 1257.

In *Cox Broadcasting Corp.* v. *Cohn*, *supra*, 420 U.S. at 467-487, this Court held the finality requirement of 28 U.S.C. § 1257, satisfied by decisions "in which the highest court of a state has finally determined the federal issues present in a particular case, but in which there are further proceedings [even entire trials] in the lower state courts to come" (*id.* at 477, 479), if

> "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come * * * [and] a refusal immediately to review the state court decision might seriously erode federal policy * * *." (*Id.* at 482-483).

In *Cox*, the federal policy threatened with erosion was freedom of speech guaranteed by the First and Fourteenth Amendment. But the Court made it clear that the

[8] Close to 99 percent of the 1717 major collective bargaining agreements in a Labor Department survey were found to have provisions for grievance procedures. U.S. Bureau of Labor Statistics, Department of Labor, Bulletin No. 1425-1, *Major Collective Bargaining Agreements: Grievance Procedure I* (1964).

same finality considerations govern where decisions upholding the power of the state to proceed threaten potential erosion of "national labor policy" by rejecting substantial federal conflict and preemption objections (*id.*, 420 U.S. at 483). The Court said that in *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), "the power of the state court to proceed in the face of the preemption claims was deemed an issue separable from the merits and ripe for review in this court," albeit the assertion of state power was embodied only in a temporary injunction. 420 U.S. at 483.

In the instant case, likewise, the conflict and preemption questions decided by the highest court of Alabama and are not subject to further review in the state courts, pp. 7-8, *supra*. Here, too, immediate review of these federal questions by this Court would terminate the litigation, whereas "a failure to decide the question now will leave" participants in labor disputes generally, and parties to grievance proceedings particularly, "operating in the shadow of the civil sanctions of a rule of law * * * the constitutionality of which [under the Supremacy Clause] is in serious doubt." *Cox*, *supra*, at 486. Here, too, "further proceedings cannot remove or otherwise affect the federal threshold issue." *New York* v. *Cathedral Academy*, 46 U.S.L.W. 4023, 4024, n. 4 (December 6, 1977). Here, again, as in *Cox*, *supra*, and in *Shaffer* v. *Heitner*, 45 U.S.L.W. 4849, 4852, n. 12 (June 24, 1977), petitioners "would have the choice of suffering a default judgment or * * * defending on the merits."

The case for immediate review of the federal questions decided below is at least as compelling as in *Cox* and *Curry* (420 U.S. at 479), not only to remove the continuing threat to national labor policy, but also to avoid the unnecessary burdening of "judicial systems already troubled by delays due to congested dockets" (*id.* at 479, quoting *Mills* v. *Alabama*, 384 U.S. 214 at 217-218 (1966)).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Washington, D. C. 20036
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Of Counsel:

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Mobile, Alabama 36602

Appendices

APPENDIX A

February 2, 1977

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1976-77

Misc. No. 540

EX PARTE: W. D. DUNNING, ET AL., PETITIONERS
(IN RE: Earl Boyes v. W. D. Dunning, et al.)

ORDER

W. D. Dunning, et al., the defendants in the case of Earl Boyes v. W. D. Dunning, et al., Civil Action No. 51576, in the Circuit Court of Mobile County, Alabama, having filed in this Court on January 12, 1977, their petition for permission to appeal from an interlocutory order entered by the Honorable Joseph M. Hocklander, Circuit Judge of the Mobile County Circuit Court on December 29, 1976,

IT IS CONSIDERED AND ORDERED that the petition be granted; and permission is hereby granted to W. D. Dunning, et al., to appeal to this Court, pursuant to the provisions of Rule 5, Alabama Rules of Appellate Procedure, from the interlocutory order entered by the Honorable Joseph M. Hocklander, Circuit Judge of the Circuit Court of Mobile County, Alabama, in the case of Earl Boyes v. W. D. Dunning, et al., Civil Action No. 51576.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and

correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 3 day of Feb. 1977.

/s/ J. O. Sentell
Clerk
Supreme Court of Alabama

APPENDIX B

[Sep. 30, 1977]

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1977

S.C. 2417

W. D. DUNNING, *et al.*

v.

EARL BOYES

Appeal from Mobile Circuit Court

MADDOX, JUSTICE.

This is an interlocutory appeal involving controlling questions of law as to which the parties substantially disagree. Those questions are:

1. Are defamatory communications made in the course of, and relevant to, a federal grievance proceeding *absolutely* privileged?

2. Is referring to a person as "a known Bigot" actionable?

The trial court, by refusing to grant the defendants' motion to dismiss a libel action, in effect, held that Alabama should recognize only a *qualified* privilege to communications made in the course of a labor grievance proceeding, and that whether the reference to the plaintiff as "a known Bigot" was libelous, was a question for a jury.

We affirm.

The defendants claim that the federal preemption doctrine has special application to grievance proceedings

conducted pursuant to collective bargaining contracts governed by federal law, "for those proceedings serve Congress' purpose of promoting industrial peace." Pertinent statements by either party in the presentation or resolution of a grievance, they say, are privileged, and they claim that to subject the parties to the risk of state tort liability for such statements "would cabin their freedom to present their positions with reference to the grievance in a manner they consider most effective."

The libel action arose out of a letter, Appendix A, written in connection with a grievance proceeding. The letter states, among other things, that the Union, after investigation, "finds no justifiable cause" for denial of a step increase to one Kyser. It attributes denial of Kyser's step increase to "Racial Overtones," and asserts:

"He [Kyser] had no trouble until Earl Boyes, a known Bigot, arrived at the Station."

The defendant filed a motion to dismiss, as follows:

> "Defendants move to dismiss the complaint for lack of jurisdiction over the subject matter. The letter referred to in the complaint, which is attached hereto and incorporated herein by reference, was written and delivered as a step in the grievance procedure of the collective bargaining contract between the United States Postal Service and defendant labor organizations cited therein. Said contract, its administration and utterances in the course thereof are goverened exclusively by federal labor law, the Postal Reorganization Act, 84 Stat. 733, 39 U.S.C. 1201, et seq. The Supremacy Clause of Article VI of the Constitution of the United States preempts state court jurisdiction over alleged common law defamation in labor disputes in the United States Postal Service, which is the subject matter of the complaint herein. *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974)."

I

We hold that defamatory communications made in the course of, and relevant to, a federal grievance proceeding are not *absolutely* privileged. Therefore, we refuse to follow the rule of absolute privilege suggested in *General Motors Corp.* v. *Mendicki*, 367 F.2d 66 (10th Cir. 1966). We follow instead what we consider is a better rule, that of a *qualified* privilege, as set out in *Bird* v. *Meadow Gold Products, Inc.*, 60 Misc. 2d 212, 302 N.Y.S. 2d 701 (1969). We believe that the rule we announce follows what the Supreme Court of the United States has established as a general rule—that a party to a labor dispute may recover for defamatory statements made during the course of the dispute if he can establish that the statement was made maliciously, with knowledge that it was false or with reckless disregard for whether it was false or not. *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53 (1966). There, Mr. Justice Clark, writing for the Court, opined:

> "Finally, it has been argued that permitting state action here would impinge upon national labor policy because the availability of a judicial remedy for malicious libel would cause employers and unions to spurn appropriate administrative sanctions for contemporaneous violations of the Act. We disagree."
>
> * * * *
>
> "* * * As was said in Garrison v. State of Louisiana, 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125: '[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.' We believe that under the rules laid down here it can be appropriately redressed without curtailment of state libel

remedies beyond the actual needs of national labor policy. . . ."

As stated by the Supreme Court in *Linn*, the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.

"Malicius libel enjoys no constitutional protection in any context," the Court said in *Linn*. "After all, the labor movement has grown up and must assume ordinary responsibility," the Court added.

II

The defendants say that even assuming that the communication is not privileged, it is not actionable, because the defamatory characterization "known Bigot" is not a statement of fact, but a "pejorative opinion: 'rhetorical hyperbole,' like calling one's adversary a 'scab,' or a 'blackmailer,' or a 'Fascist,' or 'unfair.'" The defendants contend:

> "In *Farmer* v. *Carpenters, Local 25*, 45 L.W. 4263, 4267 (March 7, 1977), the Supreme Court again explained in the strongest terms why such defamation must be immune to state libel laws:
>
> > "'The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts.'
>
> To dub one who is believed guilty of racial discrimination a 'racial Bigot' is not particularly 'robust' language and is certainly not confined to labor circles. Indeed, it is common parlance, typical of media commentators. To entertain this complaint is indeed 'intolerable.'"

We disagree with the defendants' argument. Like the Supreme Court of the United States, we are aware that "robust language" is sometimes used in labor disputes, but it is for a jury to say whether there was an abuse of the qualified privilege under all the facts and circumstances of the case. It would be inappropriate to determine this question on a motion to dismiss unless it were shown that the plaintiff could not recover under any set of circumstances, or that no issue of a material fact remained in the case, if the motion to dismiss were treated as a motion for summary judgment. Whether the qualified privilege was abused by the defendants is a jury question.

The plaintiff may be able to prove that the characterization of him was a deliberate or reckless untruth. The jury could infer that the characterization meant that Boyes discriminated against Kyser because of Kyser's race. If the charge were true, it could have meant that Boyes was guilty of violating Federal laws and regulations. See 42 U.S.C. 2000e-16 (1974), and Postal Service, 39 C.F.R. § 447.25 (1976).

AFFIRMED.

Torbert, C. J., Faulkner, Shores and Beatty, JJ., concur

[SEAL]

AZALEA CITY BRANCH NUMBER 469
NATIONAL ASSOCIATION OF LETTER CARRIERS
(Affiliated with AFL-CIO)
P.O. Box 1962
Mobile, Alabama 36601

[UNION BUG NO. 9]

May 9, 1976

Certified Mail
803015 *

Postmaster
250 St Joseph St.
Mobile, Al 36601

This is an appeal to step 2a of a grievance decision by Assistant Superintendent Cottage Hill Station (204-B) Earl Boyes, on May 7, 1976, concerning Johnnie Kyser, full time regular letter carrier PF: 5 of the Mobile, Al Postal Service.

The time limit for processing at step 1a was extended by Mutual Consent.

Management has violated the National Working Agreement, including but not limited to, Article 3 which incorporates Public Law 91-375, Article 2 and Article 9 Section 5. The grievance was filed timely by Mr. Kyser. Management's response was "That it was untimely and there had been no official notification."

On April 22, 1976, George Naman, Superintendent Cottage Hill Station, Told Mr. Kyser. "That he had denyed his step increase; due to substandard performance."

The Postal Reorganization Act states that "employes will reach the maximum pay step for their respective labor

grades after not more than 8 years satisfactory service in such grades."

After investigation the Union finds no justifiable cause for denying the step. Mr. Kyser has been at the Post Office for 4 years. There are two counselings and four complaints in his file.

This record does not indicate a serious unsatisfactory service in the performance of his duties. In fact! It displayes a good job. However, it does smack of Racial Overtones. He is the only denyed a step increase in the station. He is also Black. He had no trouble until Earl Boyes, a known Bigot, arrived at the Station.

The Union requests that Mr. Kyser be granted the step increase. The Union also requests that 8% interest be Paid.

/s/ Johnnie Kyser
JOHNNIE KYSER
Aggrieved

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness by hand this 30 day of Sep., 1977.

/s/ J. O. Sentell

W. D. Dunning
Shop Steward
NALC

/s/ W. D. Dunning

APPENDIX C

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: SC 2417

W. D. DUNNING, ET AL.
Appellant

vs.

EARL BOYES
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

/s/ J. O. Sentell
Clerk
Supreme Court of Alabama

November 18, 1977

APPENDIX D

AGREEMENT

between
United States Postal Service
and

American Postal Workers Union, AFL-CIO

National Association of Letter Carriers, AFL-CIO

National Post Office Mail Handlers, Watchmen,
Messengers and Group Leaders
Division of the Laborers' International Union
of North America, AFL-CIO

National Rural Letter Carriers' Association

[SEALS]

July 21, 1975 — July 20, 1978

[Union Label]

ARTICLE XV

GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition. A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 2. Procedure

Step 1: The employee must discuss a grievance with his immediate supervisor within fourteen (14) days of when the employee or Union has learned or may reasonably have been expected to have learned of its cause. The employee may be accompanied by his steward or a Union representative, if he so desires. The supervisor shall render a decison, stating his reasons, within five (5) days. The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the Employer's decision. Such appeal shall be in writing to the head of the installation or his designee.

The Union may also initiate a grievance at Step 1 in accordance with the above, **and may initiate a class grievance at Step 1 when the grievance concerns the complaint of more than one employee in the office.**

Step 2A: The employee shall be represented by a steward or a Union representative. The installation head or his designee will meet with the steward or Union representative as expeditiously as possible, but no later than seven (7) days after receipt of the appeal. A decision by the Employer shall be rendered within ten (10) days after it has been appealed to Step 2A. Such decision shall be in writing and the Union shall be entitled to an oral explanation of the reasons therefor. The Union shall be entitled to appeal an adverse decision to Step 3 of the grievance procedure within ten (10) days after receipt of the Employer's decision, except for the subjects specified in Step 2B.

Step 2B: In the absence of settlement through Step 2A, grievance involving the subject of disciplinary action taken against an employee or the discharge of an employee may not be submitted to Step 3 or 4, but may be appealed in writing to the **Regional Director for Em-**

ployee and Labor Relations within ten (10) days after receipt of the Employer's 2A decision. **The Regional Director for Employee and Labor Relations** shall provide a hearing at a management level higher than the installation level and at a location convenient to the parties. The management representative at Step 2B shall be a person who has had no direct connection with the case and such person shall be at a higher level than the Employer's Step 2A representative. The employee may be represented by an area or regional Union representative, and the Employer's decision shall be rendered within seven (7) days after the grievance has been appealed to this Step. Such decision shall be in writing stating the reasons therefor. If there is no settlement at this Step, the Union shall be entitled to refer the grievance to direct arbitration within **twenty-one (21)** days, and in accordance with the arbitration procedure.

Step 3: Appeals from decisions rendered at Step 2A shall be made in writing to the **Regional Director for Employment and Labor Relations.**

The employee shall be represented before the regional office by an area or regional Union representative. A decision by the Employer regarding the grievance shall be rendered within fifteen (15) days after it has been appealed to Step 3. Such decision shall be in writing stating the reasons therefor. The Union shall be entitled to appeal an adverse decision to Step 4 (national level) of the grievance procedure within fifteen (15) days after receipt of the Employer's decision.

Step 4: The parties shall meet at the national level within fifteen (15) days of such appeal in an attempt to resolve the grievance. Following this meeting, a decision by the Employer will be rendered within fifteen (15) days. Such decision shall be in writing stating the reasons therefor. If the parties are not able to resolve

the grievance, the Union shall be entitled to refer the grievance to arbitration within **forty-five** (45) days in accordance with the arbitration procedure.

Either the Union of the Employer is entitled to bypass the procedures provided in Steps 3 or 4, or both.

Failure by the Employer to render a decision in any of the Steps of this procedure within the time herein provided for (including mutually agreed-to extension periods) shall be deemed to move the grievance to the next Step of the grievance procedure.

The failure of the aggrieved party or his representative to present the grievance within the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance.

It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the national level without going through the preceding Steps.

Section 3. Arbitration. A request for arbitration must be submitted within the time limit for appeal as specified for the appropriate Step. The national President of the Union involved must give written authorization of approval to the Employer at the national level before the request for arbitration is submitted.

Grievances referred to arbitration will be placed on a pending arbitration list. Except for discharge cases, the Union will have sixty (60) days from the date of such referral to certify the case to be scheduled for arbitration at the earliest possible date. Cases which are not certified for arbitration within the sixty (60) days period shall be considered waived and removed from the pending arbitration list.

Discharge cases referred to arbitration shall be placed on a separate pending arbitration list. The Union will have fifteen (15) days from the date of such referral to certify the case to be scheduled for arbitration at the earliest possible date. Cases which are not certified for arbitration within the fifteen (15) day period shall be considered waived and removed from the pending arbitration list.

A panel of six (6) arbitrators will be established by mutual agreement to handle grievances appealed from Steps 2, 3 or 4. Absent such agreement, the method of selection and procedure will be as described below.

The panel of six (6) arbitrators will be selected by the alternative striking of names by the parties from a geographically balanced list of arbitrators provided by the Federal Mediation and Conciliation Service.

Any vacancies in the panel will be filled by the alternative striking of names from a list of five (5) arbitrators supplied by the FMCS. This method will be used if members of the panel are unavailable for any reason. By mutual agreement, the parties may increase the size of the panel, for such time as is necessary, to assure the expeditious processing of grievances. The additional arbitrators will be selected in the same manner as provided above.

The arbitrator's decision will be final and binding. The arbitrator shall render his award within thirty (30) days of the **close of the hearing on cases which do not involve interpretation of the Agreement or are not of a technical or policy-making nature. On all other cases, the award shall be rendered within thirty (30) days, if possible.** All decisions of the arbitrator shall be limited to the terms and provisions of this Agreement, and in no event, may the terms and provisions of this Agreement be altered, amended or modified by the arbitrator. All costs,

fees and expenses charged by the arbitrator will be shared equally by the parties.

Arbitration hearings shall be held during working hours. Employee witnesses shall be on Employer time when appearing at the hearing provided the time spent as a witness is part of the employee's regular working hours.

In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration with any or all other Union parties to such proceeding. **In any case in which more than one Union participates, the Unions will share one-half (½) and the Employer will pay one-half (½) of the costs of such arbitration. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by him. The arbitrator's determination shall be final and binding.**

Section 4. Expedited Arbitration. The Parties agree to continue the utilization of an expedited arbitration system for disciplinary cases which do not involve interpretation of the Agreement and which are not of a technical or policy-making nature. **This system** may be utilized by agreement of the Union involved through its national President or designee, and the Senior Assistant Postmaster General, Employee and Labor Relations Group, or his designee. In any such case, the Union and the Employer shall immediately notify the designated arbitrator. The designated arbitrator is that member of the Expedited Arbitration Panel who, pursuant to a rotation system, is scheduled for the next arbitration hearing. Immediately upon such notification the designated arbitrator shall arrange a place and date for the hearing promptly but within a period of not more than ten (10) working days. If the designated arbitrator is not available to conduct a hearing within the ten (10)

working days the next panel member in rotation shall be notified until an available arbitrator is obtained.

The hearing shall be conducted in accordance with the following:

(a) the hearing shall be informal;

(b) no briefs shall be filed or transcripts made;

(c) there shall be no formal rules of evidence;

(d) the hearing shall normally be completed within one day;

(e) if the arbitrator or the parties conclude at the hearing that the issues involved are of such complexity or significance as to warrant reference to the Regular Arbitration Panel, the case shall be referred to that panel; and

(f) the arbitrator may issue a bench decision as the hearing but in any event he shall render his decision within forty-eight (48) hours after conclusion of the hearing. His decision shall be based on the record before him and many include a brief written explanation **of** the basis **for** his conclusion. These decisions will not be cited as a precedent. The arbitrator's decision shall be final and binding. **An arbitrator who issues a bench decision shall furnish a written copy of his award to the parties within forty-eight (48) hours of the close of the hearing.**

The Expedited Arbitration Panel shall be developed by the national parties, on a national or area basis, with the aid of the American Arbitration Association, the Federal Mediation and Conciliation Service, Deans of Law Schools and the National Academy of Arbitrators. The parties shall appoint a Joint Committee with equal representation which shall have the responsibility of developing programs for appropriate orientation of the members of the arbitration panel.